



DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Part 705

[Docket No. 210902-0177]

RIN 0694-AI22

Increasing Transparency of 232 Investigations by Requiring a Public Submission for an Application for an Investigation

AGENCY: Bureau of Industry and Security, U.S. Department of Commerce.

ACTION: Final rule.

SUMMARY: This final rule revises the regulations governing a request or application for an investigation under Section 232 of the Trade Expansion Act of 1962, as amended (“Section 232”). The changes in this final rule will increase the transparency of Section 232 investigations by requiring the submission of a public version of an application for an investigation from an interested party. The changes made in this final rule still allow an interested party to submit classified national security information and/or business confidential information when submitting an application for an investigation.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: For questions regarding this final rule, contact Erika Maynard at 202–482–5572 or via email Erika.Maynard@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

Background

This final rule revises the requirements in §§ 705.5 (Request or application for an investigation) and 705.6 (Confidential information) of the National Security Industrial Base

Regulations (“NSIBR”) (15 CFR parts 700 through 709) to increase the transparency of Section 232 investigations by requiring an application for an investigation by an interested party be submitted publicly. Section 705.5 specifies the procedures for submitting a request or application for an investigation under Section 232. Section 705.6 specifies the requirements for the submission of confidential information (classified national security information or business confidential information) to the Bureau of Industry and Security (BIS) at any stage of a Section 232 investigation and as part of an application for an investigation from an interested party. In order to enhance transparency and aid public understanding of applications for Section 232 investigations submitted by interested parties, as well as, when warranted, allowing public comments on such applications (for example, when a *Federal Register* notice is published soliciting comments on an investigation), the Department of Commerce has determined that interested parties applying for a Section 232 investigation that include business confidential information or classified national security information in their submission must simultaneously submit a public version of their application to BIS.

In order to implement this change in the Section 232 investigation process, this final rule makes the following changes to part 705 of the NSIBR:

In § 705.5, this final rule revises paragraph (a) by adding a sentence to require that an application for an investigation from an interested party containing business confidential information include a public version of the entire application in writing accompanying their submission. This final rule also adds a sentence to paragraph (a) to specify that the application, if it includes business confidential information submitted in confidence pursuant to § 705.6, must contain a public summary of the business confidential information providing sufficient detail to permit a reasonable understanding of the substance of the information, and, if summarization is not possible, the application must make that claim and accompany it by a full explanation of its basis. The revisions to paragraph (a) also include guidance on how to summarize the information in sufficient detail to meet these additional requirements. This final rule adds a new cross

reference to § 705.6 to alert the public that in order to submit business confidential information that is not for public release, the applicant must follow the procedures in § 705.6, including by making a separate submission to the Department of Commerce for the public and confidential versions. Lastly, this final rule also adds a new note to paragraph (a), explaining that United States Government agencies shall be excluded from the requirement to include public versions of submissions. This rule also codifies the existing practice that an electronic copy of the application be submitted with the printed application.

In § 705.6 (Confidential information), this final rule adds three new paragraphs: (a)(1) (*Classified national security information*), (2) (*Business confidential information*) and (3) (*United States Government communication*). The revised paragraph (a) specifies the requirements for submissions and treatment of these three types of confidential information, including how submissions by the public should be marked and submitted when they include confidential information.

The classified national security information described under paragraph (a)(1) of § 705.6 will not be made publicly available and therefore does not require a public version. As a conforming change, this final rule revises existing text previously found in paragraph (a) of § 705.6, which is now being moved to paragraph (a)(1) of § 705.6, regarding the identification and marking standards for national security information. Inadvertently, this text was not previously updated to reflect identification and marking standards set forth in 32 CFR part 2001, even though BIS has been complying with the requirements in 32 CFR part 2001 and requiring submitters to comply with those requirements, as applicable, since at least 2010. These revisions explicitly align paragraph (a)(1) of § 705.6 with the requirements set forth in 32 CFR part 2001. These changes will also improve public understanding of these provisions and clarify the requirements for submitting classified national security information pursuant to § 705.6. If an applicant or other party submits business confidential information as described in paragraph (a)(2) of § 705.6, it will now be required to submit a public version of that information based on

the changes this rule makes to §§ 705.5 and 705.6. This final rule also adds a sentence at the end of paragraph (a)(2) of § 705.6 to specify that the public summary required under § 705.5 must be clearly marked “PUBLIC” as part of the submission described under paragraph (a)(1) of § 705.6. The classified national security information described under paragraph (a)(1) of § 705.6 and the United States Government communications described under paragraph (a)(3) of § 705.6 will not be made publicly available and therefore do not require a public version. Lastly, this final rule also adds a new paragraph (a)(3) to clarify the treatment of communication from the United States Government involving Section 232 investigations, including requests for the initiation of investigations received from U.S. Government agencies. This paragraph clarifies for the public that communication from agencies of the United States Government will generally not be made available to the public.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been determined to be not significant for purposes of Executive Order 12866.

2. The Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) (PRA) provides that an agency generally cannot conduct or sponsor a collection of information, and no person is required to respond to nor be subject to a penalty for failure to comply with a collection of information, unless that collection has obtained Office of Management and Budget (OMB) approval and displays a currently valid OMB Control Number.

This final regulation involves one collection currently approved by OMB with the following control number “Request for Investigation under section 232 of the Trade Expansion Act” (control number 0694-0120).

This rule is not expected to increase the burden hours for any of the collections associated with this rule as minimal changes are anticipated. Any comments regarding this collection of information, including suggestions for reducing the burden, may be submitted online at <https://www.reginfo.gov/public/do/PRAMain>. Find the particular information collection by using the search function and entering either the title of the collection or the OMB Control Number.

3. This rule does not contain policies with federalism implications as that term is defined in Executive Order 13132.

4. The provisions of the Administrative Procedure Act (APA) (5 U.S.C. 553) requiring notice of proposed rulemaking, the opportunity for public comment, and a delay in effective date are inapplicable because this regulation involves a military or foreign affairs function of the United States. (*See* 5 U.S.C. 553(a)(1)). The Section 232 investigation process is important for identifying areas where the United States’ defense industrial base is undermined to the detriment of national security. Improving efficiency and transparency of this process is important for those regulatory provisions to achieve their stated purpose.

In addition, the Department finds that there is good cause under 5 U.S.C. 553(b)(B) to waive the provisions of the APA requiring prior notice and the opportunity for public comment and under 5 U.S.C. 553(d)(3) to waive the delay in effective date because such delays would be contrary to the public interest. The changes in this rule will increase transparency of Section 232 investigations by requiring a public submission for an application for an investigation from an interested party. These changes will improve public transparency of the Section 232 investigation process, while imposing only a minimal burden on those submitting an application for an investigation to the Department. Based on BIS’s past experience, including in the recent

Section 232 investigations into imports of uranium, titanium sponge, and mobile cranes, most of the applicants each published their own public versions of their applications for an investigation with business confidential information redacted/removed (roughly contemporaneously with their submission of their applications to the Department of Commerce). Therefore, complying with the requirement to include a public version should not be burdensome for the clear majority of applicants because they have already taken the initiative to share a public version. For any other applicant who does not prepare public versions of their submissions as a matter of course, the new requirements is minimal; the information required to generate the public version is already contained within the confidential version, and applicants need only redact/remove confidential information that meets the criteria in 15 CFR 705.6 and that the applicants wish to not disclose.

Because a notice of proposed rulemaking and an opportunity for prior public comment are not required for this rule by 5 U.S.C. 553, or by any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

List of Subjects in 15 CFR Part 705

Administrative practice and procedure, Business and industry, Classified information, Confidential business information, Imports, Investigations, National security.

For the reasons set forth in the preamble, part 705 of subchapter A of 15 CFR chapter VII is amended as follows:

PART 705 – [AMENDED]

1. The authority citation for part 705 continues to read as follows:

Authority: Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862) and Reorg. Plan No. 3 of 1979 (44 FR 69273, December 3, 1979).

2. Section 705.5 is amended by revising paragraph (a) to read as follows:

§705.5 Request or application for an investigation.

- (a) A request or application for an investigation shall be in writing. The original, 1 copy and an electronic version of the report in the form of a Portable Document Format (PDF) file shall be filed with the Director, Office of Technology Evaluation, Room H-1093, U.S. Department of Commerce, Washington, DC 20230, with the PDF version being submitted to DIBPrograms@bis.doc.gov. An application for an investigation from an interested party that includes information submitted in confidence in accordance with the procedures of § 705.6 must also include a public version in written and electronic form containing all non-confidential information and public summaries of business confidential information as provided below. For persons seeking to submit business confidential information (trade secrets, commercial or financial information, or any other information considered sensitive or privileged), the public version of the application must contain a summary of the business confidential information in sufficient detail to permit a reasonable understanding of the substance of the information. Generally, numerical data will be considered adequately summarized if grouped or presented in terms of indices or figures within 10 percent of the actual figure. If an individual portion of the numerical data is voluminous (*e.g.*, 5 pages of numerical data), at least one percent of the numerical data, representative of that portion, must be summarized. If the submitter claims that summarization is not possible, the claim must be accompanied by a full explanation of the reason(s). In order to submit business confidential information that is not for public release or classified national security information as a separate submission to the U.S. Department of Commerce, applicants must follow the procedures specified in § 705.6.

Note 1 to paragraph (a): Requests for an investigation from United States Government agencies need not include a public version.

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3. Section 705.6 is amended by revising paragraph (a) to read as follows:

§ 705.6 Confidential information.

(a) This paragraph (a) specifies the requirements for submission of classified national security information, business confidential information, and the treatment of United States Government communications during an investigation under Section 232 of the Trade Expansion Act of 1962, as amended (a “Section 232 investigation”), or as part of a request or application for an investigation.

(1) *Classified national security information.* Any information or material, which the applicant or any other party desires to submit in confidence at any stage of the investigation or as part of an application for an investigation, that is classified national security information (“classified information”) within the meaning of Executive Order 13526 shall be marked and submitted to the Bureau of Industry and Security (BIS) in accordance with the guidelines set forth in 32 CFR part 2001 regarding the handling of classified information. Before sending classified information, the applicant or any other party wishing to submit classified information must contact BIS for any additional handling instructions or submission requirements that may be applicable by contacting the Director, Office of Technology Evaluation, Room H-1093, U.S. Department of Commerce, Washington, DC 20230. Any information or material submitted that is identified as classified information must be accompanied at the time of submission by a statement indicating the degree of classification, the authority for the classification, and the identity of the classifying entity. Classified national security information described in this paragraph (a)(1) does not require a public version.

(2) *Business confidential information.* Any information or material submitted electronically, which the applicant or any other party desires to submit in confidence at any stage of the investigation or as part of an application for an investigation, that is business confidential information (trade secrets, commercial or financial information, or any other information considered sensitive or privileged) should be contained within a file beginning its name with the characters “BC”. Any page containing business confidential information must be clearly marked “BUSINESS CONFIDENTIAL” on the top of that page, and any pages not containing confidential information should not be so marked. By submitting information or material identified as business confidential information, the applicant or other party represents that the information is exempted from public disclosure, either by the Freedom of Information Act (5 U.S.C. 552 *et seq.*) or by some other specific statutory exemption. Any request for business confidential treatment must be accompanied at the time of filing by a statement justifying non-disclosure and referring to the specific legal authority claimed. The public summary version required under § 705.5 must be clearly marked “PUBLIC”. When submitted electronically, the file name of the non-confidential version should begin with the character “P”. The “P” should be followed by the name of the person or entity submitting the information or material. All filers should name their files using the name of the person or entity submitting the comments.

(3) *United States Government communications.* Communications from agencies of the United States Government, including but not limited to requests for investigation submitted pursuant to § 705.5, will generally not be made available to the public.

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Matthew S. Borman,

Deputy Assistant Secretary

for Export Administration.

